Petition

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

PETROL STOPS NORTHWEST AND
KENNETH B. GALLIGAN
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

Whether the order of a district court in a jurisdiction foreign to the main action, which denies discovery from a nonparty witness residing outside the jurisdiction of the main action, is a final appealable order within the meaning of 28 U.S.C. § 1291.

PARTIES BELOW

The following is a list of all parties to the proceeding in the court of appeals, as required by Supreme Court Rule 21.1(b):

1. Petrol Stops, Northwest, Plaintiff/Appellee;

2. Kenneth B. Galligan, Deponent/Appellee;

3. Gulf Oil Corporation, Defendant/Appellant; Affiliates of Gulf Oil Corporation are as follows:

GULF OIL CORPORATION

Afran Bahamas Ltd. Marine Dept.
Alberta Products Pipe Line Ltd.
Allied-General Nuclear Services
American Heavy Lift Shipping Company
Asia Polymer Corporation
A/S Jargul
A/S Jargul and Co. K/S
Australian Gulf Oil Company
Balinesian Gulf Oil Ltd.
Britama Tankers Limited
Cabinda Gulf Oil Company
Canada Systems Group (EST) Limited
Carboquimica, S.A.
China Gulf Oil Company, Ltd.
China Gulf Plastics Corporation
Colonial Pipeline Company
Compania Petrolera Aguarico S.A.
Compagnie D'Investments Pour Les Combustibles De Reacteurs a Haute Temp
Coser S.A.
Eastern Gulf Oil Company, Ltd.
Eastern Venezuela Gas Transport Company
Ethylene Pijpleiding Maatschappij (Belgium) S.A.
Ethylene Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company
Gaelic Oil Co. Ltd.

G & C Realty Limited
GEA/Power Cooling Systems, Inc.
General Atomic Company
General Atomic Europe—G.m.b.H.—Zurich
Gulf Canada, Ltd.
Gulf Ecuatoriana de Petroleo, S.A.
Gulf Italia Production Co. S.p.A.
Gulf Italiana SpA
Gulf Oil A/S
Gulf Oil (Belgium) SA
Gulf Oil Chemicals Company Asia Limited
Gulf Oil Company (Nigeria) Ltd.
Gulf Oil Company of Gabon
Gulf Oil Company (Portugal) Limited
Gulf Oil Company South Asia
Gulf Oil Egypt, Ltd.
Gulf Oil (Great Britain) Ltd.
Gulf Oil (Ireland) Ltd.
Gulf Oil (Luxembourg) S.A.
Gulf Oil Pakistan Ltd.
Gulf Oil Refining Ltd.
Gulf Oil Sales, Inc.
Gulf Oil (Switzerland)
Gulf Oil Trading GmbH
Gulf Oil Trading Investments Limited
Gulf Oil Zaire S.a.R.L.
Gulf Oman Petroleum Ltd.
Gulf Pipeline Company
Gulf Sales and Supply, Inc.
Gulf Supply and Distribution Co. Ltd.
Gulf (U.K.) Offshore Investments Limited
Harshaw Cabo & Cia, S.A.
Harshaw Chemie S.a.R.L.
Harshaw Galvanotechnia S.A.
Harshaw Quimics Ltda.
Hochtemperatur Reaktorbau G.m.b.H.
Ico Pinturas, S.A.

Industrias Vencedor S.A.
Interquimics S.A.
INSCO Holding and Finance Company N.V.
INSCO Limited
Java Gulf Ltd.
Kentucky Anfo, Inc.
Keydril Ltd.
Keydril (Nigeria) Ltd.
Key International Drilling Co. Limited
Key Perfuracoes Maritimas, Ltd.
Kupan Emirates Company Ltd.
Kuwait Oil Company Limited
Laurel Pipe Line Company
London Oil Refining Company Limited
Mid-Atlantic Chemical Corp. S.A.
Midwest Carbide Corporation
Millmaster Onyx (Canada) Ltd.
Millmaster Onyx G.m.b.H.
Montreal Pipe Line Company Limited
Mozambique Gulf Oil Company
New Frontiers, Ltd.
Niugini Gulf Oil Pty., Ltd.
Oklahoma Nitrogen Company
Panindustrial, S.A.
Peace Pipe Line, Ltd.
Pembroke Craking Company
Permapint, S.A.
Petroleo Gulf do Brazil Limitada
Petroleos Gulf de Guatemala, S.A.
Plaschem International Company (Hong Kong) Ltd.
Plastigama, S.A.
Productos Quimicos Somox, Ltda.
Project Baltic
Propet Company Ltd.
Pyropower Corporation

Raffinerie de Cressier S.A.
Rimbey Pipe Line Co., Limited
Rio Blanco Oil Shale Partnership
Sarni S.p.A.
Silvertown Lubricants Limited
Sociedad Anonima Espanola de Lubrificantes
Societe de Combustible Pour Reacteurs
a Haute Temp.
Solvent Refined Coal International
South Pacific Gulf Oil Company
Spanish Gulf Oil Company
Spencer Quimica Mexicana S.A. de C.V.
Sultron Ltd.
Surinam Gulf Oil Company
Taita Chemical Corporation
Trans Northern Pipe Line Company
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company
Western G.M.C. Pontitac Buick Ltd.

4. Continental Oil Company (now "Conoco Inc."), Defendant/Appellant; Affiliates of Conoco Inc. are as follows:

CONTINENTAL OIL COMPANY (CONOCO INC.)

Big Sky of Montana Realty, Inc.
Calcasieu Chemicals Corporation
Condea Chemie, GmbH
CitCon Oil Corporation
Conch International Methane, Ltd.
Conoco, A.G.
Petroquimica Espanola, S.A. (Petresa)*
T.A.L. (Austria)*
T.A.L. (Italy)*
T.A.L. (Luxembourg)*
Conoco Limited
Conoco Management Company
Conoco Exploration, Ltd.*

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* Indicates partially owned company of wholly owned subsidiary.

Conoco Mineraloel GmbH
T.A.L.*
Conoco North Sea, Inc.
K/s Statfjord Transport A.S. & Co.*
Statfjord Tranpsort A.S.*
Conoco Norway, Inc.
K/s Statfjord Transport A.S. & Co.*
Statfjord Transport A.S.*
Consolidation Coal Company
Bishop Coal Company*
Cardinal River Coals, Ltd.*
Contochu, Inc.*
Harmar Coal Company*
Itmann Coal Company*
Mathies Coal Company*
Consolidation Coal Sales Company*
Wolfpen Knob Development Company*
Stone Cove Coal Company
Continental Carbon Company
Carbon Black Espanola, S.A.
Columbian Continental Europa, S.p.A.
Compagnie Francaise du Carbon Black, S.A.
Continental Carbon Australia Pty. Limited
Continental Columbian Carbon Nederland, B.V.
Continex Francaise S.A.R.L.
Continex Nederland B.V.
Continex S.r.l.
Lucky Continental Carbon Co., Ltd.
Toyo Continental Carbon, Ltd.
Conoco (U.K.) Limited
Associated Petroleum Terminals (Immingham) Ltd.*
Cliffe Storage, Ltd.*
Crude Oil Terminals, Ltd.
Humber Oil Terminals Trustee, Ltd.*
Petroleum Storage, Ltd.*
Warwickshire Oil Storage, Ltd.*

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* Indicates partially owned company of wholly owned subsidiary.

Continental Pipe Line Company
Colonial Pipeline*
Dixie Pipeline*
Lake Charles Pipe Line*
Pioneer Pipe Line Company*
Platte Pipe Line*
Seadock, Inc.*
Seaway Pipeline, Inc.*
West Shore Pipe Line*
Yellowstone Pipe Line*
DuPont Holdings, Inc.
E.I. duPont de Nemours and Company
Explorer Pipeline Company
Felix Oil Company
Hudson's Bay Oil and Gas Company Limited
Alberta Gas Truck Line Company, Ltd.
Aurora Pipe Line Company
Cansulex Ltd.
Chieftain Mac Gas Ltd.
Hudbay Exploration, Inc.
Hudbay Mining Limited
Hudbay Oil Company of Denmark A/S
Hudbay Oil Company of Denmark Ltd.
Hudbay Oil (Australia) Ltd.
Hudbay Oil (Egypt) Ltd.
Hudbay Oil (Indonesia) Ltd.
Hudbay Oil International Ltd.
Hudbay Oil (Ireland) Ltd.
Hudbay Oil (Malacca Strait) Ltd.
Hudbay Oil (Netherlands) Ltd.
Hudbay Oil (Spain) Ltd.
Hudbay Oil (Turkey) Ltd.
Hudbay Uranium Ltd.
Hudson's Bay Oil and Gas Company (U.K.) Limited
Norske Hudbay A/S

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* Indicates partially owned company of wholly owned subsidiary.

Northward Developments, Ltd.
Peace Pipe Line, Ltd.
Rangeland Pipe Line Company Limited
Rimbey Pipeline Co., Ltd.
Smiley Gas Conservation Ltd.
Sultran Ltd.
Syncrude Canada, Ltd.
Kettleman North Dome Association
Long Beach Oil Development Company
Maritime Protection A/S
Nippon Aluminum Alkyes, Ltd.
Nissan Conoco Corporation
Oil Shippers Service, Inc.
OMW (Karlsruhe)
Pasa Petroquinica Argentina, S.A.
Petroleum Terminals, Inc.
Petrocokes, Ltd.
San Jacinto Eastern Corporation
Iricon Agency, Ltd.*
Selang Ltd.
Southern Facilities, Inc.
Standard Shale Products Company

5. Douglas Oil Company of California, Defendant/Appellant is a wholly-owned subsidiary of Petitioner, Conoco Inc.

6. Phillips Petroleum Company, Defendant/Appellant; Affiliates of Phillips Petroleum Company are as follows:

PHILLIPS PETROLEUM COMPANY

Acurex Corporation
Aero Oil Company
Alyeska Enterprises, Inc.
Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Bonny LNG Ltd. (P.P. Worldwide Gas Ltd.)

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* Indicates partially owned company of wholly owned subsidiary.

Bruin Carbon Dioxide Sales Corporation
Calatrava Empress Para la Industria
Petroquimica, S.A.
Canada Western Cordage Co., Ltd.
Canyon Reef Carriers Inc.
Cochin Refineries Ltd.
Colonial Pipeline Company
Compagnie Francaise du Carbon Black S.A.
Dixie Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Gardner Cryogenics Europe N.V.
Insurance and Reinsurance Brokers (Bermuda) Ltd.
Iranian Marine International Oil Company
Kaw Pipe Line Company
Kenai LNG Corporation
LeeFac, Inc.
Negromex S.A.
Nordisk Philblack AB
Norland GmbH
Norpipe A/S
Norpipe Petroleum U.K. Ltd.
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Ltd.
Papago Chemicals, Inc.
Petrochim
Phillips Carbon Black Company (Pty.) Ltd.
Phillips Carbon Black Italiana S.p.A.
Phillips Carbon Black Limited
Phillips Gas Supply Corporation
Phillips Imperial Petroleum Limited
Phillips Pacific Chemical Company
Phillips Petroleum Singapore Chemicals
(Private) Limited
Philmac Oils Limited
Plasticos Vanguardia S.A.
Polar LNG Shipping Corporation
Polyolefins

Powder River Corporation
Renolit Fertighaus GmbH
Seadock, Inc.
Seaway Pipeline, Inc.
Sevalco (Holdings) Limited
Societe De Developpement Des Polyolefins
Transatlantic Reinsurance
Trenwick Ltd.
Western Desert Operating Petroleum Company
White River Shale Oil Corporation

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Gulf Oil Corporation, Continental Oil Company (now "Conoco Inc."), Douglas Oil Company of California, and Phillips Petroleum Company, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on December 29, 1981.

ORDERS BELOW

The order of the court of appeals vacating its original order, and reconsidering dismissing Petitioners' appeal is unreported, but appears in Appendix A. The original order of the court of appeals dismissing Petitioners' appeal is unreported, but appears in Appendix B. The May 20, 1981, order of the district court partially denying discovery on Gulf's motion to compel the deponent's testimony is unreported, but appears in Appendix C. The June 24, 1981, order of the district court modifying and amending its May 20, 1981, order is also unreported, but appears in Appendix E.

JURISDICTION

The order of the court of appeals, following a vacation of a previous order and reconsideration, was entered on December 29, 1981. This petition for writ of certiorari was filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES

United States Code

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

—28 U.S.C. § 1291 (1958)

STATEMENT OF THE CASE

I. Background and Proceedings Before the District Court.

In 1973, respondent Petrol Stops Northwest brought an antitrust action in the District of Arizona against petitioners and eight other oil companies.[1] Petrol Stops operated a chain of self-serve gas stations in several western states. Respondent Kenneth B. Galligan emerged at deposition as Petrol Stops' central witness. Mr. Galligan has testified that virtually all petroleum refiners and retailers in Southern California, as well as a United States Senator, and other political leaders were involved in an international price fixing conspiracy which claimed Petrol Stops as a victim. Mr. Galligan's credibility is a central issue in the case particularly because of his admission that he gave "primarily false and manufactured" testimony to a federal grand jury.[2]

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1. No. CIV 73-212 TUC ACM In the United States District Court For the District of Arizona. *Petrol Stops Northwest v. Continental Oil Co.*, 534 F.2d 1322 (9th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976); *Douglas Oil Company of California v. Petrol Stops Northwest*, 441 U.S. 221 (1979); and *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005 (9th Cir. 1981) *cert. denied*, ____U.S.____ (1981), are previous appeals in this litigation. The first appeal was from an order disqualifying plaintiff's law firm. The second and third involved orders granting access to grand jury materials.

2. Mr. Galligan made appearances before federal grand juries on August 18, 1972, April 9, 1973, November 28, 1973, and April 17, 1974. He is presently giving deposition testimony in *In Re: Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation*, Docket No. MDL-150, pending before Judge Gray in the Central District of California. After 15 days of examination in *MDL-150*, on defendants' motion, Judge Gray appointed a special master to preside over the continued deposition of Mr. Galligan. All of his testimony involves assertions of his lead role in alleged gasoline price fixing in the late '60s and early '70s. He claims to have been shot at, bribed, blackballed, harrassed, and had his business burned to the ground and family turned against him because of his testimony

In October 1980, Petrol Stops commenced Mr. Galligan's deposition in the Southern District of Florida where the witness now resides. Cross-examination by Petitioners began in early January, 1981. After the witness repeatedly refused to answer questions put to him by petitioners, Gulf Oil Corporation's counsel adjourned the deposition and, joined by the other petitioners, filed a motion to compel in the Southern District of Florida.[3] Specifically, petitioners sought to have the district court order Mr. Galligan to answer questions propounded in eight areas of inquiry which Mr. Galligan had foreclosed. In the meantime, Petrol Stops moved the trial court in Arizona to terminate or have limits placed upon the deposition. That motion was denied. Petrol Stops then filed substantially the same motion in the Florida court.

On May 20, 1981, after hearing, The Honorable James C. Paine of the Florida court granted in part and denied in part petitioners' motion and imposed various limitations on the deposition. The order is Appendix C. Paragraph 3 of the order forecloses cross-examination regarding Mr. Galligan's activities during the last six years except in two specific areas outlined in the paragraph.

On June 4, 1981, petitioners moved to modify or clarify the May 20 order, particularly paragraph 3. The motion is Appendix D. On June 24, 1981, the court granted the motion in part. However, the court specifically refused to modify or amend paragraph 3. The June 24,

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against the oil industry. Recently, Mr. Galligan has taken his accusations to prime time television and headline newspaper accounts. Further, he reports recent requests for movie rights to his life story.

3. Petitioners could file in no other court. *See* Rule 37(a)(1), Fed. R. Civ. P. "An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken."

1981 order is Appendix E. Appendices "C" and "E" are referred to herein as the "Florida order."

II. Proceedings Before the Courts of Appeals.

In June and July, 1981, petitioners appealed to the Fifth Circuit that part of the Florida order, as modified and amended, which denied discovery. Petrol Stops moved to dismiss the appeal and on November 6, 1981, the court of appeals dismissed the appeal on the ground "there is no final or appealable order, without prejudice to any right to appeal the appellant may assert after the proceedings in the district court have been completed." The order is Appendix B.

On December 29, 1981, the newly formed Eleventh Circuit vacated the order of November 6, 1981, reconsidered appellee's motion to dismiss the appeal and reentered the order of dismissal. The order is Appendix A.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF SEVEN OTHER CIRCUITS IN THE INTERPRETATION OF 28 U.S.C. § 1291 IN THAT IT FORECLOSES APPELLATE REVIEW OF AN ORDER BY A DISTRICT COURT IN A FOREIGN JURISDICTION DENYING DISCOVERY FROM A NONPARTY WITNESS BEYOND THE JURISDICTION OF THE TRIAL COURT.

The Eleventh Circuit dismissal of petitioners' appeal from the Florida order jeopardizes the right of any party to conduct discovery outside the circuit in which the trial court sits. The order places substantial limitations on petitioners' right to cross-examine plaintiff's key witness.

The order takes from the Arizona trial court the opportunity to make evidentiary rulings regarding the credibility of a pivotal witness who cannot be made to appear at trial.[4] The order is final for all practical purposes. "It disposes of the contentions of all the parties, leaving nothing else to be decided. The order may need enforcing if not obeyed, but this does not prevent its being a final judgment." *United States v. Byoir*, 147 F.2d 336, 337 (5th Cir. 1945). If petitioners attempt to examine the witness in the areas forbidden by the order, they will risk contempt of the Florida court. If petitioners try to appeal after the deposition is over and if all persons were to comply or even not to comply with the Florida order, there would be no order or judgment which would trigger anew the 30 day jurisdictional period for noticing an appeal from the 1981 discovery orders.[5] An appeal to the Ninth Circuit after final judgment in Arizona could not involve review of the discovery order entered in Florida. An appeal to the Eleventh Circuit after final judgment in Arizona would be cumbersome and impractical. (*See, infra—Republic Gear Company v. Borg-Warner Corporation*, 381 F.2d 551 (2d Cir. 1967).

The decision of the Eleventh Circuit conflicts with decisions of at least seven other circuits. In *Horizons Titanium Corporation v. Norton Company*, 290 F.2d 421 (1st Cir. 1961), the First Circuit held that a discovery order disposing of the only proceedings in the district growing out of a particular controversy, and the only proceeding pending between these particular parties anywhere, was a "final decision" within the meaning of 28 U.S.C. § 1291. In that case, a party to an action in the

4. Rule 45(e)(1) Fed. R. Civ. P.

5. Rule 4(a)(1) Fed. R. App. P.

District of Columbia sought documents from nonparties in Massachusetts. The Massachusetts district granted the nonparties' motion to quash the subpoena. The court of appeals vacated the order, explaining that "[i]t is not the fact that the order below dealt with a motion to quash a subpoena duces tecum that is controlling . . . [n]or does it make any difference that the court's action was not a final judgment in the usual sense. What is critical is whether the party seeking the subpoena has any other means of obtaining review." *Id.* at 423-24. The court ruled that, since the Massachusetts residents were not subject to the jurisdiction of the D.C. court, the only opportunity for review of the order of the Massachusetts court would be in the Second Circuit.

In *Republic Gear Company v. Borg-Warner Corporation,* 381 F.2d 551 (2d Cir. 1967), the Second Circuit denied the request of a nonparty witness in New York to dismiss the appeal from an order quashing a subpoena duces tecum issued in aid of plaintiff's case in Illinois. The court held that the order was "final" within the meaning of § 1291, and therefore appealable, explaining that

> Where, as here, an order denying discovery is issued in a jurisdiction beyond that of the main proceeding, the party seeking discovery would have no effective remedy; even if the appellate court in the jurisdiction in which discovery is sought averted a final decision in the main proceeding before acting at all it would be necessary to return to the ancillary appellate court to argue the discovery issue. And if, upon appeal, the party were successful in reversing the lower court's order and thus obtain discovery, he would be required to go back to the court where the main case had already been tried, and there, with the discovery evidence now admissible on the merits,

> move to retry the case. The impracticability of this cumbersome procedure compels us to grant immediate appellate review of an order which, in another context, we might properly hold to have been an interlocutory order. Id. at 554.

See also 4 MOORE'S FEDERAL PRACTICE ¶ 26.83[5] (1979) and 8 WRIGHT & MILLER, *Federal Practice and Procedure*, Civ. § 2006.

In *National Life Insurance Company v. Hartford Accident and Indemnity Company*, 615 F.2d 595 (3d Cir. 1980), the Third Circuit *sua sponte* raised the issue of "finality" under § 1291. The main action was pending in the Southern District of Florida and the Eastern District of Pennsylvania had denied National Life deposition discovery from a nonparty Pennsylvania witness. Applying a three-prong test, the Third Circuit concluded that the discovery order was appealable because it made (1) a final resolution of (2), the only issue before the Pennsylvania court, and (3) an appeal in the Fifth Circuit from a final judgment in Florida could not review the Pennsylvania discovery order. "Thus National Life's right to appeal this motion would be irrevocably lost if we were not to allow this appeal." Id. at 597.

Similarly, in *Ochsner v. Millis*, 382 F.2d 618 (6th Cir. 1967), the Sixth Circuit found final and appealable the denial of a motion to compel deposition testimony where the discovery proceeding was in the Western District of Kentucky and the main action was pending in the patent office in Washington, D.C. The court found the order met the test of appealability because it was a "final decision for all practical purposes" and it was the only opportunity to "effectively review" the district court's order. Id. at 623.

The Eleventh Circuit is similarly in conflict with the Seventh Circuit in *Carter Products, Inc. v. Eversharp, Inc.*, 360 F.2d 868 (7th Cir. 1966). There an order denying a motion to compel a nonparty witness residing in Illinois to answer deposition questions and produce documents pursuant to a subpoena duces tecum for use in a California action was held appealable as a "final decision" under 28 U.S.C. § 1291. The Seventh Circuit said: "For all practical purposes this proceeding is appellants' only chance to obtain discovery from [the witness in Illinois], and this appeal their only opportunity for review of the district court's order denying access to the information. We think fairness to [appellants] and fidelity to the purposes of discovery procedures require us to permit appeal of the order which is certainly final as to appellants and [the witness in Illinois]". Id. at 870.

The Eleventh Circuit also conflicts with the District of Columbia Circuit in *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 351 F.2d 762 (D.C. Cir. 1965). The D. C. Circuit held appealable under 28 U.S.C. § 1291 a district court order quashing a subpoena duces tecum served on the federal government as part of a "National Discovery Program" devised to expedite hundreds of treble-damage actions brought in the federal courts against manufacturers of electrical equipment. Defendants-appellants had been sued in the same district court as that quashing the subpoena. The court of appeals reasoned that, as to those appellants, the appeal could be taken following a final judgment of that action. However, as to defendants in other jurisdictions who also had an interest in the subpoena, the court of appeals followed the First Circuit's reasoning in *Horizons Titanium, supra*, to conclude that those defendants "may have no review

of the decision as it affects them if we do not review it herein." Id. at 351 F.2d 766.

The Eleventh Circuit's decision is likewise in conflict with the Ninth Circuit in *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225 (9th Cir. 1975). The Ninth Circuit refused to dismiss plaintiff's appeal from an order of a California court granting in part and denying in part the motion of a California witness not party to the main action pending in Minnesota, to quash plaintiff's subpoena duces tecum. The witness claimed the order was not "final" under 28 U.S.C. § 1291. Nontheless, applying the "common sense" and "logic" of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949),[6] and relying on "the unanimous opinion of those courts in other circuits which have confronted the issue," the Ninth Circuit concluded that it had jurisdiction over the appeal. 511 F.2d 228-229.

The refusal of the Eleventh Circuit to apply the "common sense" and "logic" of the other circuits and of this court in *Cohen*, forecloses for petitioners all effective review of an order having a potentially irreparable impact on the conduct of the Arizona litigation. Petitioners, by the denial of discovery, have been foreclosed from examining a central witness on important matters bearing directly upon the deponent's credibility and competency as a witness. As far as those discovery rights are concerned, they have been terminated. Congressional desire to avoid piecemeal appeal does not dictate such a result. *See Premium Service, supra* at 511 F.2d 228.

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6. In *Cohen* this court reaffirmed that 28 U.S.C. § 1291 is to be given a "practical rather than technical construction" so that the rights conferred by the statute will not be lost. 337 U.S. 541.

CONCLUSION

For the reasons stated above, it is respectfully prayed that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Conoco Inc. and Douglas
Oil Company of California

---

* Designates counsel of record in accordance with Supreme Court Rule 33.2(a).

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5719

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

vs.

CONTINENTAL OIL COMPANY,
GULF OIL, PHILLIPS PETROLEUM,
DOUGLAS OIL,
Defendants-Appellants,

vs.

KENNETH B. GALLIGAN,
Deponent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Upon receipt of the motion of appellant for a stay of the mandate pending certiorari, one of the members of the panel became aware that she owned some stock in one of the defendants-appellants. The judge did not notice this conflict upon receipt of the appellee's motion to dismiss the appeal because not all of the defendants were listed in the caption of the motion. Reference was not made to the caption of the order when approving the order.

The judge who is disqualified in this matter has recused herself from further consideration of any part of this case. The two remaining judges on this panel, constituting a quorum, do hereby order the following:

(1) The order heretofore entered by the panel dismissing the appeal is hereby vacated;

(2) Upon reconsideration of appellee's motion to dismiss the appeal, the same is hereby GRANTED; and

(3) The motion of the appellant for a stay of the mandate pending certiorari is DENIED.

ISSUED AS MANDATE:

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 81-5719

U.S. Court of Appeals
Eleventh Circuit
Filed
Nov. 6, 1981
Norman E. Zoller
Clerk

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

versus

CONTINENTAL OIL COMPANY,
GULF OIL, PHILLIPS PETROLEUM,
DOUGLAS OIL,
Defendants-Appellants,

versus

KENNETH B. GALLIGAN,
Deponent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

Before RONEY, KRAVITCH, and CLARK,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss the appeal is GRANTED on the ground there is no final or appealable order, without prejudice to any right to appeal the appellant may assert after the proceedings in the district court have been completed.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6079-Civ.-JCP

PETROL STOPS NORTHWEST,
Plaintiff,

v.

CONTINENTAL OIL COMPANY, et al.,
Defendant.

ORDER

Before the Court is Gulf Oil Corporation's application to compel the deponent Kenneth B. Galligan to answer questions presented by the applicant at his deposition. This motion has been joined by Douglas Oil Company of California, Conoco Inc., Armour Oil and Phillips Petroleum Company. Opposed to the motion is Petrol Stops Northwest which has filed a cross-motion for protective order.

The Court having considered the memoranda in support of the parties' positions and having heard argument by the parties and the deponent, grants both motions in part.

On page 3 of Gulf Oil's supporting memorandum (filed under seal) applicant has listed eight subject areas lettered A through H in which it seeks to resume questioning. The witness may be asked and is directed to answer questions concerning all eight subjects, but with the following qualifications:

1. Counsel may not ask any question which was already asked by another defendant's counsel and substantially answered by the deponent.

2. Counsel are precluded from asking questions of the deponent which seek to find out what he said or why he said something at a previous hearing, deposition, or interview. The Court is not prohibiting questions about areas of concern which may have been the subject of questions and answers at previous depositions. Counsel are merely foreclosed from making inquiries such as that found on line 18 p. 875 of the transcript which relate to the deponent's prior statements but are not directed to past events, conversations, observations which underlie the merits of the case.

3. With regard to subject matter B, Mr. Galligan's activities after leaving Trans-Tech Resources, the deponent is directed to answer, if asked, inquiries concerning his business and financial relations and questions about his assertions of being followed, shot, that his businesses were burned, and any other similar assertions. All other inquiry about the deponents last six years' activities is foreclosed.

4. Defense counsel may depose Mr. Galligan for three additional days not exceeding seven hours per day.

5. The deposition shall be concluded within sixty days of the date of the order at a time and place mutually agreeable to the parties and the deponent.

It would appear that the time has arrived for maximum cooperation among the parties and the witness so that this portion of the underlying case can be brought to a conclusion. Counsel shall make every effort to consolidate

their questions to avoid repetition. Mr. Galligan shall answer all questions directly, concisely, and avoid volunteering information that is not required by the question. Thereupon, it is

ORDERED and ADJUDGED that the parties and deponent shall go forward with the deposition in accordance with the above ruling.

DONE and ORDERED at West Palm Beach, Florida, this 20th day of May, 1981.

/s/ JAMES C. PAINE
United States District Judge

cc: Harold J. Bliss, Jr., Esq.
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Richard B. Munks, Esq.
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Michael M. Levy, Esq.
James L. O'Loughlin, Esq.
John R. Hoehl, Esq.
Jay D. Gurmankin, Esq.
Mr. Kenneth B. Galligan
James A. Fein, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 81-6079-CIV-JCP

No. CIV 73-212 TUC-JAW
(District of Arizona)

PETROL STOPS NORTHWEST,
Plaintiff,

v.

CONTINENTAL OIL COMPANY, et al.,
Defendants.

MOTION OF DEFENDANTS FOR CLARIFICATION AND MODIFICATION OF MAY 20, 1981 ORDER REGARDING THE DEPOSITION OF KENNETH B. GALLIGAN

Defendants seek clarification in part and modification in part of the following paragraphs of this Court's order of May 20, 1981 regarding the deposition of Kenneth B. Galligan:

Paragraph "1" Of the Court's Order

> "Counsel may not ask any question which was already asked by another defendant's counsel and substantially answered by the deponent."

Proposed Modification of Paragraph "1"

Defendants respectfully ask the Court to delete paragraph "1". In support of its motion to terminate Mr.

Galligan's deposition brought before the trial court in Arizona, plaintiff asserted among other things that the deposition has been "repetitious". Judge Walsh found, after reviewing the deposition transcript, that some repetition is unavoidable as each examiner tries to develop the particular status of his client.[1] Defendant Gulf, for example, should not have orderly examination about Gulf foreclosed by a hodgepodge of scattered references to Gulf in earlier cross examination by attorneys with other clients in mind.

This Court has elsewhere insured (through the three day limitation in paragraph 4) that no time will be wasted with unnecessary repetition. On the other hand if paragraph "1" is not deleted, substantial time could be wasted each time defendants try to reach a consensus with Mr. Galligan and plaintiff's counsel as to whether a particular question has been "substantially answered" someplace earlier in the deposition transcript.

Paragraph "2" Of the Court's Order

> "Counsel are precluded from asking questions of the deponent which seek to find out what he said or why he said something at a previous hearing, deposition, or interview. The Court is not prohibiting questions about areas of concern which may have been the subject of questions and answers at previous deposiitons. Counsel are merely foreclosed from making inquiries such as that found on line 18 p. 875 of the transcript which relate to the deponent's prior statements but are not directed to past events, conversa-

1. See page 58: 18-24 of the transcript of the hearing in Arizona attached hereto as Exhibit A. The full transcript is attached as Exhibit A to Defendants' Memorandum In Opposition to Plaintiffs' Cross Motion for Protective Order.

tions, observations which underlie the merits of the case."

Proposed Clarification of Paragraph "2"

Defendants ask this Court to confirm that paragraph "2" is not to be read as limiting in any way defendants' right to confront Mr. Galligan with prior inconsistent statements pursuant to Rule 613 of the Federal Rules of Evidence.

Paragraph No. "3" Of the Court's Order

"With regard to subject matter B, Mr. Galligan's activities after leaving Trans-Tech Resources, the deponent is directed to answer, if asked, inquiries concerning his business and financial relations and questions about his assertions of being followed, shot, that his businesses were burned, and any other similar assertions. All other inquiry about the deponents last six years' activities is foreclosed."

Proposed Clarification of Paragraph "3"

Defendants ask this Court to confirm that Paragraph "3" is not to be read as limiting in any way defendants' right to cross examine Mr. Galligan concerning specific activities or instances of conduct within the last six years which may be probative of the witness' character for truthfulness or untruthfulness, bias, motives or interest, or which may have a bearing upon his ability to rationally perceive and recall events and to comprehend and correctly relate the truth.[2]

---

2. See Rule 608(b) of the Federal Rules of Evidence and cases cited at page 2 of Defendant's Supplemental Memorandum In Opposition to Plaintiff's Motion To Limit Cross Examination of Mr. Galligan Regarding The Last Six Years Of His Life And The International Oil Conspiracy filed May 20, 1981.

Paragraph "5" Of the Court's Order

> "The deposition shall be concluded within sixty days of the date of the order at a time and place mutually agreeable to the parties and the deponent."

Proposed Modification of Paragraph "5"

Defendants ask that the time for concluding the deposition be extended to sixty days after either (1) a copy of Mr. Galligan's grand jury testimony is made available to defendants for copying or (2) a final determination is made denying defendants access to the grand jury transcripts.

On February 24, 1981, defendant Armour Oil Company filed a petition with the Central District of California for an order transferring the grand jury transcripts to the trial court in Arizona. (See Exhibit B). Plaintiff joined in the petition. The petition was heard on March 30, 1981 before Judge Gray. Judge Gray indicated that he would be willing to transfer the transcripts to the trial court in Arizona but he has not yet entered an order. (See page 4 of Exhibit C.) The government expressed no opposition to the transfer. (See Exhibit D.) Mr. Galligan's former employer, Powerine Oil Company opposed the release. Defendant Gulf has joined in the motion and this court's order of May 20, 1981 has been brought to Judge Gray's attention in the hope of expediting the transfer of the transcripts to the trial court in Arizona. (See Exhibit E.)

The grand jury transcripts are vital to the deposition of Mr. Galligan. The grand jury testimony was given in four appearances in 1972-74, soon after the alleged events occurred while his present testimony is often more than ten years after the alleged events. The transcripts have already been released to private litigants in other proceed-

ings. Defendants may suffer substantial prejudice if required to conclude Mr. Galligan's deposition before gaining access to his grand jury testimony.

Defendants respectfully ask this Court to modify and clarify the Order of May 20, 1981 as herein requested.

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By: /s/ JAMES L. O'LOUGHLIN

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-6079-Civ-JCP

PETROL STOPS NORTHWEST,
Plaintiff,

v.

CONTINENTAL OIL COMPANY, et al,
Defendants.

ORDER

This cause has come before the Court on defendants' motion for clarification and modification of its Order of May 20, 1981 regarding the deposition of Kenneth Galligan. Having reviewed the record and the submissions of counsel, the following modifications to the previous order are deemed appropriate and will be made.

A. Paragraph "1" of the original order is modified to include the following addition: Only counsel and not the deponent will be permitted to object on the grounds of repetition. Such objection shall be sustained if the movant can cite to the transcript page where the question has already been asked and answered.

B. Paragraph "2" of the original order is modified to include the following addition: Questions will be permitted that are in strict conformity with Federal Rule Evidence 613.

C. Paragraph "5" of the original order is amended as follows: The deposition will be concluded within sixty days after either a copy of Mr. Galligan's grand jury testimony is made available to the defendants for copying or a final determination is made denying access to the grand jury transcripts.

D. The Court finds that the intent of Paragraph "3" is apparent and will not be modified or confirmed as requested by the defendants. It is, therefore,

ORDERED and ADJUDGED that the Court's order of May 20, 1981 is modified and amended as recited above.

DONE and ORDERED at West Palm Beach, Florida, this 24th day of June, 1981.

/s/ JAMES C. PAINE
United States District Judge

cc: All Counsel
Kenneth Galligan

Opposition

Office - Supreme Court, U.S.
FILED
APR 27 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1479

In the Supreme Court of the United States

October Term 1981

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

PETROL STOPS NORTHWEST AND
KENNETH B. GALLIGAN,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

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No. 81-1479

In the Supreme Court of the United States

October Term 1981

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

PETROL STOPS NORTHWEST AND KENNETH B. GALLIGAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Respondent Petrol Stops Northwest respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Gulf Oil Corporation (hereinafter "Gulf"), Phillips Petroleum Company (hereinafter "Phillips"), Conoco, Inc. (hereinafter "Conoco"), and Douglas Oil Company of California (hereinafter "Douglas"), seeking review of the United States Court of Appeals for the Eleventh Circuit's dismissal of petitioners' appeal from a decision of the United States District Court for

the Southern District of Florida, dated May 20, 1981, granting, in substantial part, petitioners' Motion to Compel Answers to Deposition Questions, as modified by the orders of June 24, 1981 and March 8, 1982.

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit vacating its original order dismissing petitioners' appeal and reaffirming its decision to dismiss said appeal and deny petitioners' motion to stay is unreported, but appears in Appendix A to the Petition. The original order of the United States Court of Appeals for the Eleventh Circuit dismissing petitioners' appeal is unreported, but appears in Appendix B to the Petition. The May 20, 1981 order of the district court granting, in substantial part, petitioners' motion to compel discovery is unreported, but appears in Appendix C to the Petition. The June 24, 1981 order of the district court modifying and amending the May 20, 1981 order is also unreported, but appears in Appendix E to the Petition. Finally, the March 8, 1982 order of the district court further modifying its orders of May 20, 1981 and June 24, 1981 is unreported, but appears herein as Appendix A.

JURISDICTION

The jurisdictional requisites upon which petitioners rely are adequately set forth in their Petition.

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit erred in dismissing an appeal from an

interlocutory order of a district court in a jurisdiction foreign to the jurisdiction in which the main action is to be tried, which granted, in substantial part defendants' motion to compel answers to questions put to a non-party witness in a deposition not yet completed, where (1) it was found that the order was not a final appealable order within the meaning of 28 U.S.C. § 1291, and (2) the dismissal was entered without prejudice to any right to appeal the petitioners might assert after the proceedings in the foreign jurisdiction had been completed.

STATUTES

Relevant statute 28 U.S.C. § 1291 is adequately set forth in the Petition.

STATEMENT OF THE CASE

A. *BACKGROUND AND NATURE OF THIS CASE.*

In December, 1973, respondent Petrol Stops Northwest (hereinafter "Petrol Stops") filed the instant action against 11 oil companies, including defendants-petitioners Gulf, Phillips, Douglas and Conoco, claiming that the defendants and their co-conspirators had combined and conspired to fix, raise and maintain both the retail and wholesale price of gasoline in Arizona, California, Oregon and Washington, in violation of the federal antitrust laws. The action was filed in the United States District Court for the District of Arizona.

While trial in this action is now set to begin prior to August of this year, discovery has, in the past, often proved to be inordinately expensive and unreasonably delayed. Before any significant discovery in this matter

had ever been taken, the defendants moved to disqualify the predecessors of this law firm from representing plaintiff in this action. The defendants succeeded in convincing the district court to disqualify plaintiff's counsel from the case. Petrol Stops appealed the ruling, and, eventually, the United States Court of Appeals for the Ninth Circuit reversed the lower court's order in *Petrol Stops Northwest v. Conoco, Inc., et al.*, 534 F.2d 1322 (9th Cir. 1976). During the pendency of the appeal, however, all discovery was stayed for nearly two years.

Shortly thereafter, plaintiff sought to obtain access to the transcripts of grand jury testimony of employees of defendants Phillips and Douglas, which had been taken during the federal grand jury investigation that led to the filing of criminal indictments in *United States v. Phillips Petroleum Co., et al.*, Criminal Docket No. 75-377 (C.D. Cal. 1975).[1] Petrol Stops obtained access to those particular transcripts by the United States District Court for the Central District of California, the grand jury court. Thereafter, the defendants appealed, and the decision of the district court was affirmed by the Ninth Circuit, which held that the plaintiff's need for said transcripts far outweighed any existing need for continued grand jury secrecy. *Petrol Stops Northwest v. United States*, 571 F.2d 1127 (9th Cir. 1978), *cert. granted sub. nom., Douglas Oil Co. v. Petrol Stops Northwest*, 437 U.S. 902 (1978).

---

[1] Defendants Phillips and Douglas, as well as their co-defendants in that action, including Powerine Oil Company, pled **nolo contendere** to the criminal charges.

Douglas and Phillips sought review in this Court, and on the basis of a procedural error, this Court reversed the circuit court's decision and remanded the action with direction that both the grand jury court in Los Angeles and the trial court in Tucson consider the issues involved in granting disclosure of said grand jury testimony. *Douglas Oil Company v. Petrol Stops Northwest*, 441 U.S. 211 (1979). On remand, both the grand jury court and the trial court found that the need for continued grand jury secrecy was far outweighed by Petrol Stops' need for access to said transcripts. Petitioners again appealed from the lower court's decision, and again the Ninth Circuit affirmed. *Petrol Stops Northwest v. Continental Oil Company*, 647 F.2d 1005 (9th Cir. 1981). Petitioners' petition to this Court for a writ of certiorari was denied late last year in *Conoco, Inc. v. Petrol Stops Northwest*, ... U.S. ....., 102 S.Ct. 672 (1981). Respondent has made every effort to move forward to complete discovery, in spite of the considerable delays which these numerous appeals have caused. At this time, the trial court has ordered that discovery be completed by May 28, 1982, and as stated above, that trial in this matter begin in August, 1982.

B. *THE PROCEEDINGS IN THE DISTRICT COURT BELOW.*

In October, 1980, Petrol Stops began the deposition of Kenneth Galligan in Ft. Lauderdale, Florida. Prior to September, 1971, Mr. Galligan had served as a pricing manager for Powerine Oil Company, an alleged unnamed co-conspirator of the defendants in this action and a criminal defendant in the above-described criminal

action in Los Angeles, California. In plaintiff's five-day direct examination, Mr. Galligan described his participation in alleged unlawful conspiracies, and how he arranged and orchestrated agreements between competitors in the oil industry, including defendants, for the purpose of fixing, stabilizing and maintaining the retail and wholesale prices of gasoline. His testimony, both during the direct and subsequent cross-examination, however, unequivocally demonstrated that he had not had any involvement in the oil industry, nor any connection with any facts or issues raised in this lawsuit, since 1974, the year he moved from the Los Angeles area.

In January of 1981, the petitioners began their cross-examination of Mr. Galligan. During this unusually lengthy cross-examination, the petitioners exhaustively interrogated Mr. Galligan on personal matters up to and including 1981, and on other wholly collateral matters. On some occasions, Mr. Galligan refused to answer these questions, as well as numerous questions which had already been asked and answered. On January 16, 1981, after ten days of cross-examination, counsel for Gulf suspended the deposition for the stated purpose of moving for an order to compel Mr. Galligan to answer certain questions in those specific areas in which he had previously refused to do so. On February 9, 1981, petitioner Gulf filed a motion in the Southern District of Florida to compel the non-party witness to answer questions presented by Gulf and other defendants at his deposition. Gulf's motion was joined by Douglas, Conoco and Phillips, and former defendant Armour Oil Company. Respondent Petrol Stops opposed this motion and filed a

cross-motion for a protective order limiting the scope of Mr. Galligan's deposition. In its motion, Gulf sought primarily to compel Mr. Galligan to answer questions in eight specific areas of examination. On May 13, 1981, Gulf's motion was heard before the Honorable James C. Paine in the United States District Court for the Southern District of Florida.

On May 20, 1981, Judge Paine granted the parties' motions, in part, ordering the witness, Mr. Galligan, to appear for further questioning and directing him to "answer questions concerning all eight subjects" (Appendix C to the Petition). In ordering that the deposition be resumed and that the witness answer the questions put to him by counsel for Gulf and the other defendants, several minor qualifications with regard to the examination were included in the order. First, counsel were directed not to ask questions which had already been asked by counsel for other defendants and substantially answered by the deponent. Counsel were also directed not to ask questions improperly directed towards prior statements allegedly made by the deponent which were not related to the merits of the underlying action. The deponent, who has had absolutely no involvement with the oil industry for over six years, was further ordered over the protests of himself and respondent to answer questions concerning his business and financial relations during that six-year period and to respond to inquiries about any testimony he had given to the effect that he had been followed, shot at, had his business burned, and other similar testimony. The court, however, did foreclose examination into the deponent's personal affairs

other than business and financial relations during the last six years—personal affairs which could not possibly bear on the issues in the lawsuit or his credibility. Finally, the court further qualified its order by limiting Mr. Galligan's deposition to three additional days, and by ordering that it be concluded within 60 days from the date of entry of its order.

Shortly thereafter, petitioners moved the court to modify and clarify its Order of May 20, 1981 in several respects. This motion was granted on June 24, 1981 (Appendix E to the Petition), and again, petitioners were granted substantially everything they wanted. The district court modified its previous order by further directing that only counsel, and not the deponent, could object to questions on the grounds that said questions were repetitious; that paragraph 2 of its original order be modified to allow for questioning in conformity with Rule 613 of the Federal Rules of Evidence; and, finally, that the time within which the deposition must be concluded be extended to 60 days from the date on which defendants' petition to obtain Mr. Galligan's grand jury testimony was granted or denied, rather than from the date of entry of the May 20, 1981 order.

Judge Paine, therefore, recognized the importance of insuring that the defendants be given the opportunity to examine Mr. Galligan fully within the borders of reason. Judge Paine had one additional directive to the parties in the underlying action, which is set forth in his concluding remarks in his Order of May 20, 1981:

> It would appear that the time has arrived for maximum cooperation among the parties and the witness so that this portion of the underlying case can be brought to a conclusion. Counsel shall make every effort to consolidate their questions to avoid repetition. Mr. Galligan shall answer all questions directly, concisely and avoid volunteering information that is not required by the question. . . .
>
> Appendix C to the Petition, p. 2.

In March of 1982, the petitioners petitioned the district court to relieve them from the 60-day time limit the court had set for completion of Mr. Galligan's deposition. The district court granted petitioners' motion without oral argument (*see* Order, dated March 8, 1982, attached hereto as Appendix A), and left the decision as to when Mr. Galligan's deposition was to be completed to the trial court in Tucson. It further denied Petrol Stops' motion to quash the subpoena which petitioners had served upon Mr. Galligan. The trial court has, in turn, permitted the petitioners to begin the completion of Mr. Galligan's deposition on April 29, 1982. It has also granted petitioners' request that a master be appointed to preside over the final three days of Mr. Galligan's deposition.

C. *THE ELEVENTH CIRCUIT'S ORDER OF DISMISSAL.*

Petitioners' appeal from the district court's orders of May 20, 1981 and June 24, 1981 was filed long before any attempt was made to complete Mr. Galligan's deposition and determine if, in fact, the petitioners were entitled to any additional substantive testimony from this

witness. The Eleventh Circuit recognized this in holding that Judge Paine's order was not a final or appealable order and that it was, therefore, without jurisdiction to consider petitioners' appeal. It specifically held, however, that the appeal was dismissed without prejudice to any right to appeal the petitioners may assert after the proceedings in the district court had been completed. The petitioners themselves proved the Court of Appeals correct in this analysis by filing numerous motions relating to the Galligan deposition *after the appeal had been lodged*. More importantly, in response to those motions filed by petitioners, the district court has conducted further proceedings and entered additional orders in the Galligan deposition proceedings. Obviously, the Eleventh Circuit did not err when it concluded that the proceedings in the Southern District of Florida were not complete.

In sum, petitioners have been granted substantially everything they sought from the lower courts regarding Mr. Galligan's deposition. In effect, the Eleventh Circuit was not asked to review an order denying the taking of discovery, but, rather, was asked to review an interlocutory order relating to an ongoing deposition which was, and still is, subject to further modification by lower courts. The petitioners themselves implicitly admit that their appeal was premature. In their Motion for Advisory Opinion Recommending Appointment of Judge Arthur K. Marshall to Preside Over the Continued Deposition of Kenneth B. Galligan, dated March 29, 1982, included herein as Appendix B, petitioners moved for the appointment of a master for the completion of

Mr. Galligan's deposition on the grounds that the master would be "helpful in arbitrating questions arising under paragraphs 1, 2 and 3 of Judge Paine's order". Obviously, the master's interpretation and application of the provisions of Judge Paine's order governing the completion of Mr. Galligan's deposition might dramatically alter the nature and scope of any appeal taken therefrom. How could the order possibly be effectively reviewed by the Court of Appeals before the deposition goes forward pursuant to the order now at issue?

REASONS FOR DENYING WRIT

A. *THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY AND CONSISTENTLY APPLIED THIS COURT'S DECISIONS AND OPINIONS OF OTHER CIRCUITS DISMISSING APPEALS FROM DISCOVERY ORDERS WHICH ARE INTERLOCUTORY IN NATURE AND FILED PREMATURELY.*

The Eleventh Circuit correctly interpreted and applied the firmly established axiom of law that appeals, with rare exception, can only be taken from final orders under 28 U.S.C. § 1291. That decision is fully consistent with law well established by this Court and the other circuits. In *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), this Court held that discovery orders being interlocutory in nature are not appealable as final orders. A primary purpose for that strict limitation on appellate jurisdiction is to prevent piecemeal disposition

of a single controversy which would otherwise permit parties to obstruct the prosecution of just claims by raising a costly succession of separate appeals from various rulings. Here, the Eleventh Circuit carefully reviewed the record before it and found that Judge Paine's order granting, in substantial part, petitioners' motion to compel was neither final nor appealable. It did not hold, as petitioners contend, that an order emanating from, and completing the proceedings in, a jurisdiction foreign to the main action, completely denying the taking of discovery, is not appealable as a final order. Petitioners' attempt to concoct purported discrepancies between the Eleventh Circuit's order and the law in seven other circuits is without merit and should be rejected.

The authorities cited and relied upon by petitioners in their Petition, and the substantive principles embodied therein, are simply not in conflict with the circuit's dismissal of the appeal below. In each of the circuit opinions cited in the Petition, the proceedings in the district courts below had been completed and the parties who ultimately sought appellate review had been effectively denied from taking discovery as a direct result of orders either denying motions to compel discovery or granting motions to quash subpoenas. Each of those opinions, therefore, is distinguishable on their facts and is not applicable here. For example, on page nine of their Petition, petitioners contend that the Eleventh Circuit's order below is in direct conflict with the law in the Seventh Circuit, as set forth in *Carter Products, Inc. v. Eversharp, Inc.*, 360 F.2d 868 (7th Cir. 1966). There, a district court in the Northern District of Illinois *denied*

the defendant's motion to compel answers to specific deposition questions put to a third-party witness and to compel production of documents sought by a subpoena duces tecum. The underlying patent action had been brought in California. The Court of Appeals refused to dismiss the appeal on the grounds that the order denying access to discovery in the foreign jurisdiction was certainly final as to the parties and the witness. The order was characterized as "effectively a quashing of a subpoena, as well as a refusal to compel discovery". *Carter Products,* supra at 870.

The court went on, however, to make it clear that in its decision, it fully recognized this Court's warning in *Cobbledick, supra.* However, because the order in question did "settle" the issue as to the witness and appellants, the appeal would not impinge upon the general principle against fragmentary appeals that impede the progress of the main litigation. *Carter Products, supra,* at 872. Here, on the other hand, no showing was made below, and certainly no finding was ever reached, that (1) petitioners had been denied discovery; or (2) the issues between petitioners and third-party witness Galligan had been "settled" with finality; or (3) allowing such an appeal would not impinge on the general principle against fragmented appeals. To the contrary, it is obvious that the numerous fragmented appeals previously taken in this case have already substantially impeded the progress of the main action. Respondent submits that petitioners' instant Petition is merely one more tactic of delay which should not be condoned or accepted.

B. *THERE IS NO IMPORTANT QUESTION OF JUDICIAL POLICY OR LAW PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI.*

No significant question of judicial policy or law requiring this Court's attention exists. The standards for final and appealable orders under 28 U.S.C. § 1291 are well established and were, in this instance, correctly applied. Petitioners' right to file an appeal, if eventually an appeal proves necessary at the appropriate time, was preserved in the Eleventh Circuit's order of dismissal. No important interests could possibly be served and no important question of law could possibly be resolved if the Petition is granted. It is certainly not the function of this Court to second guess the Court of Appeals once the competing interests have been carefully weighed and it is concluded that the Court does not have before it a final or appealable order, especially when all steps necessary to preserve petitioners' right of appeal have been taken. The interests of fairness and justice, as envisioned by this Court in *Cobbledick, supra,* mandate that the instant petition be denied and that the main action be allowed to proceed to a final resolution on the merits in a speedy and just manner.

CONCLUSION

For the foregoing reasons, respondent Petrol Stops Northwest respectfully submits that the Petition for Writ of Certiorari in this case should be denied.

DATED this 21st day of April, 1982.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6079-CIV-JCP

PETROL STOPS NORTHWEST,

Plaintiff,

v.

CONTINENTAL OIL COMPANY, GULF OIL, PHILLIPS PETROLEUM DOUGLAS OIL,

Defendants.

Before the Court is Defendants' emergency motion for clarification or modification of paragraph C of the June 24, 1981 Order regarding the deposition of Kenneth B. Galligan. That paragraph placed a limit on the time in which the Galligan deposition could be concluded. At the time the Court was interested in minimizing the inconvenience to Mr. Galligan who was understandably reluctant to voluntarily devote any more time than necessary to the taking of his deposition. Paragraph C stated:

> The deposition will be concluded within sixty days after either a copy of Mr. Galligan's grand jury testimony is made available to the Defendants for copying or a final determination is made denying access to the grand jury transcripts.

This ruling did not explicitly mention documents produced during Mr. Galligan's grand jury testimony as the Court was not made cognizant that the Defendants required these documents in addition to the grand jury

transcripts. It also appears that the Defendants were not sure of the existence of these documents or their significance when they initially sought clarification of this Court's first order in this matter. (See p. 3 of Defendants' March 1, 1982 motion).

The Plaintiff is anxious to complete the Galligan deposition. It rightfully desires to bring the case to trial. In its response memorandum, Plaintiff asserts that Defendants have represented to the trial court that they cannot pursue their discovery until after the Galligan deposition is completed. Plaintiff believes that Defendants are attempting to indefinitely delay the bringing of this case to trial.

The issue of when Mr. Galligan's deposition should be completed as opposed to how long the deposition should be is a matter better decided by Judge Marquez, the trial judge. A judge ruling on a matter pursuant to F.R.C.P. 37 (a) should avoid where possible rulings which affect the trial judge's prerogative to manage discovery. While the Court's previous ruling does not unduly interfere, the modification now sought by the Defendants will postpone the deposition indefinitely. This Court should not in these circumstances determine the necessity of conditioning the deposition on the Defendants' custody of the grand jury documents. Moreover, there is nothing before the Court to indicate that Mr. Galligan is not indifferent to a possible postponement of the deposition. Therefore, it is

ORDERED and ADJUDGED that the limitations placed on the parties in the Court's previous Orders with

regard to concluding the deposition (specifically paragraph C of the June 24, 1981 Order) are rescinded. In other respects the Court's previous Orders remain in effect.

Plaintiff has moved to quash the subpoena served on Kenneth B. Galligan. There has been no showing that the Plaintiff has standing to request this relief. *Langford v. Chrysler Motors Corp.* 513 F.2d 1121 (2nd Cir. 1975).

ORDERED and ADJUDGED that Plaintiff's Motion to quash is denied.

DONE and ORDERED at West Palm Beach, Florida this 8th day of March, 1982.

U.S. District Judge
James C. Paine

cc: Harold J. Bliss, Jr., Esq.
M. Daniel Hughes, Esq.
Arthur H. Rice, Esq.
James L. O'Loughlin, Esq.
James T. Jeffus, Esq.
Mark A. Brand, Esq.
Marjorie A. Wilhelm, Esq.
Michael M. Levy, Esq.
Jay D. Gurmankin, Esq.
Gary F. Bendinger, Esq.
Richard W. Casey, Esq.
Kenneth B. Galligan
Shutts & Bowen
James E. Tribble
Hon. Alfredo C. Marquez

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 73-212-TUC-ACM

PETROL STOPS NORTHWEST,
Plaintiff,

vs.

CONTINENTAL OIL COMPANY, ET AL.,
Defendants.

MOTION FOR ADVISORY OPINION RECOMMENDING APPOINTMENT OF JUDGE ARTHUR K. MARSHALL TO PRESIDE OVER THE CONTINUED DEPOSITION OF KENNETH B. GALLIGAN

I.

INTRODUCTION

Kenneth B. Galligan is plaintiff's chief witness. Galligan has testified that virtually all petroleum refiners and retailers and other political leaders were involved in an international price fixing conspiracy which claimed Petrol Stops as a victim. He claims to have been shot at, bribed, blackballed, harrassed, and had his business burned to the ground and family turned against him because of his testimony against the oil industry. After reading the 15 days of Galligan's *Petrol Stops'* deposition, Judge Walsh called Galligan "as difficult a witness to examine as I have ever observed". Deposition cross-examination of Galligan in the Southern District of Flor-

ida may be the most important testimony taken in the case. He cannot be made to appear at trial. Judge Paine of the Southern District has given defendants three days to conclude the Galligan deposition.[1] Defendants must make the most of that time. As shown hereafter, Galligan must be controlled if defendants are to have the opportunity for fair and reasonable cross-examination. Defendants seek the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure to control Galligan's behavior and to direct that he answer all proper questions. Plaintiff has been contacted about this and does not oppose the appointment of a special master so long as defendants bear the expense.

Defendants propose the appointment of the Honorable Arthur K. Marshall, recently appointed by Judge Gray to preside over the continued deposition of Galligan in the *MDL-150* proceedings pending in the Central District of California. Judge Gray was able to make the appointment effective in the Southern District of Florida through his nation-wide powers in *MDL-150* as a multidistrict judge under 28 U.S.C. § 1407(b). By this motion, your Honor is asked to recommend appointment of a special master. If the recommendation is made, defendants in turn will move Judge Paine to make the recommendation effective in the Southern District of Florida. Defendants have come to this court first because of Judge Paine's recent order recognizing the trial judge's prerogative in managing discovery. See p. 2, Judge Paine's order of March 8, 1982.

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[1] Judge Paine's orders of May 20, 1981, June 24, 1981, and March 8, 1982, are attached as Exhibits "A", "B", and "C".

II.

APPOINTMENT OF A SPECIAL MASTER IS NECESSARY AND APPROPRIATE

Mr. Galligan regards himself as above the rules governing a deposition witness. He frequently responds with lengthy, rambling narratives and becomes hostile if interrupted. If he does not feel like answering, he often responds "asked and answered" and then demands a fresh question. Judge Walsh noted these peculiarities in denying plaintiff's motion to terminate or limit the deposition when he observed:

> He (Galligan) seemed to have the idea that he could make the rules, and he wasn't going to read anything that they (defense counsel) suggested he look at, because he was going to get to that one . . . later.
>
> * * *
>
> Sometimes, he took ten pages to answer a question.
>
> * * *
>
> I can't remember how many times that I read that, when he was asked a question, he would say, 'That has been asked and answered. That has been asked and answered', thereby disposing of the question.
>
> * * *
>
> Well, this goes to why it took so many days, in my judgment. He purported to answer when he wanted to and not when he wanted to, it seemed to me.
>
> * * *
>
> I will have to say, in all frankness, that he was about as difficult a witness to examine as I have ever observed. See pp. 23-26 and 57-60 of the February 23, 1981, hearing transcript.

Frequently, Mr. Galligan refuses to answer until "the Judge tells me or orders me to" (KG Dep. Tr. 875-880), "until a judge tells me what he thinks" (KG Dep. Tr. 2346-49), "unless I'm so ordered by a judge", "when a judge tells me" (KG Dep. Tr. 1833-37), "unless a judge tells me that I do, I won't", (KG Dep. Tr. 2305-07), "until some governing legal authority tells me" (KG Dep. Tr. 1460), "I'll refrain from answering until a judge asks me to answer and then I'd be happy to" (KG Dep. Tr. 2332-37).

Judge Paine has ordered Mr. Galligan to answer questions in nearly all areas covered by defendants' motion to compel. However, new areas are likely to arise at the resumed deposition which are not covered by the order. With only three days left for examination of Galligan, and facing a possible discovery cutoff in less than two months, defendants may be prejudiced if they must take the time to return Mr. Galligan to the Southern District of Florida on another motion to compel. It would be much more expeditious to have on hand at the deposition an experienced trial judge, familiar with Mr. Galligan's behavior as a witness, who can resolve such questions immediately as they arise. Defendants are also reluctant (if it can be avoided) to bother Judge Paine again with this out-of-state case of no interest to the Southern District of Florida. The special master would also be helpful in arbitrating questions arising under

paragraphs 1, 2, and 3 of Judge Paine's order.[2] A special master on the firing line may substantially reduce the need for return trips to Judge Paine for an interpretation of the order and substantially increase the chances of concluding the deposition within the three days now allotted by Judge Paine.

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[2] Paragraphs 1, 2, and 3 of Judge Paine's order of May 20, 1981, as amended June 25, 1981, state as follows:

> 1. Before the Court is Gulf Oil Corporation's application to compel the deponent Kenneth B. Galligan to answer questions presented by the applicant at his deposition. This motion has been joined by Douglas Oil Company of California, Conoco, Inc., Armour Oil and Phillips Petroleum Company. Opposed to the motion is Petrol Stops Northwest which has filed a cross-motion for protective order. Only counsel and not the deponent will be permitted to object on the grounds of repetition. Such objection shall be sustained if the movant can cite to the transcript page where the question has already been asked and answered.
>
> 2. Counsel are precluded from asking questions of the deponent which seek to find out what he said or why he said something at a previous hearing, deposition or interview. The Court is not prohibiting questions about areas of concern which may have been the subject of questions and answers at previous depositions. Counsel are merely foreclosed from making inquiries such as that found on line 18 p. 875 of the transcript which relate to the deponent's prior statements but are not directed to past events, conversations, observations which underlie the merits of the case. Questions will be permitted that are in strict conformity with Federal Rule Evidence 613.
>
> 3. With regard to subject matter B, Mr. Galligan's activities after leaving Trans-Tech Resources, the deponent is directed to answer, if asked, inquiries concerning his business and financial relations and questions about his assertions of being followed, shot, that his businesses were burned, and any other similar assertions. All other inquiry about the deponents last six years' activities is foreclosed.

III.

JUDGE MARSHALL IS AN EMINENT TRIAL JUDGE. HIS APPOINTMENT AS A SPECIAL MASTER WILL NOT APPRECIABLY DELAY THESE PROCEEDINGS.

Judge Marshall, now retired, has had many years of experience as a trial judge in the Superior Court of Los Angeles, California. He was appointed as a special master in *MDL-150* after a lengthy selection process. He is already familiar with Galligan as a witness from his extensive review of Galligan testimony in connection with Galligan's *MDL-150* deposition. He would be available to preside at the Galligan *Petrol Stops* deposition commencing on April 29, 1982, just one week after the date presently ordered by this court.[3]

IV.

CONCLUSION

Mr. Galligan's conduct as a witness to-date, precludes effective cross-examination. Unless something is done, further time consuming motions to compel may be unavoidable. Appointment of a special master will do much, we believe, to avoid unnecessary delays in completing the deposition. Under Rule 53(d), a special

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[3] Judge Marshall is not available on April 21, 22, and 23, 1982. Defendants have renoticed the deposition of Mr. Galligan, subject to approval of this court, for April 29, 1982. This recommended delay would not affect the present discovery schedule since there is no discovery scheduled for April 29, 1982, and plaintiff has noticed the deposition of Eugene McDaniels for April 19, 1982, a deposition which may extend into the presently ordered deposition date for Galligan. Since McDaniels will be in California and Galligan in Florida, the travel difficulties for all parties warrant a rescheduling.

master is empowered to exercise contempt powers to compel the production of evidence. The exercise of this power at the Galligan deposition by an experienced trial judge sitting as a special master, will expedite the procedure and make further motions to compel unnecessary.

Dated March 29, 1982.

Respectfully submitted,

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